No. 02-94

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM OVERTON, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

MICHELLE BAZZETTA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, COLORADO STATE PUBLIC DEFENDER, FAMILIES AGAINST MANDATORY MINIMUMS, FORTUNE SOCIETY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, OFFICE OF THE IDAHO STATE APPELLATE DEFENDER, OSBORNE ASSOCIATION, PUBLIC DEFENDER OF INDIANA, THE WOMEN'S PRISON ASSOCIATION AND HOME, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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STATEMENTS OF INTEREST OF AMICI CURIAE [1]

Public Defender Service for the District of Columbia

The Public Defender Service for the District of Columbia (PDS) represents indigent citizens of the District of Columbia facing a loss of liberty, whether at trial, on appeal, in post-conviction proceedings, or in ancillary and collateral matters. PDS has established a Community Defender Program, which has a goal of assisting in the reintegration of prisoners returning to the D.C. community. As a result of the National Capital Revitalization Act (Revitalization Act), Pub. L. 105-33 (codified in part at D.C. Code § 24-101 (2002)), many PDS clients are incarcerated in Bureau of Prisons (BOP) facilities and contract facilities across the country. Nonetheless, D.C. family members often make significant efforts to visit them. This case will determine whether these visits must be permitted.

Colorado State Public Defender

The Colorado State Public Defender is a statewide public defender system responsible for representing most indigent defendants in the state trial and appellate courts. Clients include individuals serving prison terms for felony convictions in the Colorado Department of Corrections (DOC). As reflected in the amicus brief filed by the Colorado State Attorney General, the DOC has promulgated several regulations that seriously impact the non-contact visitation rights of affected inmates. The importance to prisoners of visitation as a means of maintaining contact with intimate associates cannot be overstated. The DOC's regulation of such visits should be tempered by the requirement recognized by the Sixth Circuit that a regulation be reasonably related to a legitimate penological interest and

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[1] The parties' letters of consent have been filed with the Clerk. No party has authored any part of the brief and no entity external to the *amici* organizations has contributed money toward its preparation.

by the recognition of the constitutional rights of prisoners under the First, Eighth, and Fourteenth Amendments.

Families Against Mandatory Minimums

Families Against Mandatory Minimums (FAMM) is a nonprofit, nonpartisan organization with nearly 30,000 members and forty chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive costs of mandatory minimum sentencing. The costs are not limited to public expenditures but include the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and culpability of the offender. FAMM, whose members include prisoners and their families, has an interest in ensuring that prison policies not inhibit family contact or lead to the deterioration of family and social bonds critical to prisoner well-being and rehabilitation.

Fortune Society

The Fortune Society, founded in 1967, is an ex-offender service and advocacy organization that provides a broad range of programs to prisoners and releasees including alternatives to incarceration and wrap-around reentry services. Approximately 2000 releases walk through our doors each year to seek assistance, and an additional 8,000 prisoners are reached annually. In the Fortune Society's experience, the support of family members is one of the primary foundations for a successful reentry from incarceration and avoidance of future recidivism. For Fortune Society clients, "family" includes extended family because often that is the only family that is available, since all too many come from broken homes or foster care. Fortune Society has learned that efforts to strengthen a prisoner's family bonds prior to release

are an important part of bringing that prisoner home as a constructive member of his or her family and community.

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide—along with eighty state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately thirty-five *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues. See NACDL's website at www.nacdl.org.

National Association of Federal Defenders

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

National Legal Aid and Defender Association

The National Legal Aid and Defender Association (NLADA), is a private, nonprofit membership organization founded in 1911. Its purpose is to promote the availability of quality legal services in civil and criminal cases to individuals who are unable to afford to retain private counsel. Its membership includes approximately 3,000 offices, including civil legal aid providers, public defender programs at the county, state and federal level, statewide defender commissions, assigned counsel programs, contract defender programs, state and local defender associations, law school criminal clinics, and death penalty trial and post-conviction programs. It has members in all fifty states and the District of Columbia, and provides training, technical assistance, internet information resources, standards, periodicals and other publications, and *amicus curiae* participation in appropriate cases affecting the rights of poor and low-income people seeking equal access to justice.

Office of the Idaho State Appellate Public Defender

The Office of the Idaho State Appellate Public Defender represents indigent criminal defendants in their appeals from felony criminal convictions, denial of post-conviction petitions or denial of state habeas petitions. A vast majority of its clients are incarcerated; in the past, many have been housed out of state. Family visitation is critical for their successful rehabilitation and return to society.

Osborne Association

The Osborne Association is a seventy-five-year-old New York nonprofit organization that serves prisoners, former prisoners, and their children and families. Osborne offers parenting programs to mothers and fathers in four New York State prisons, operates children's visiting centers in two prisons, and provides extensive family reunification services for people leaving prison. Osborne's experience clearly demonstrates that prisoners who are able to maintain and

strengthen family ties during incarceration through humane visitation and family programs are more likely to successfully reenter their families and communities, and that their children are more likely to achieve healthy outcomes.

Public Defender of Indiana

The Public Defender of Indiana represents all indigent, incarcerated men and women who request the Public Defender's assistance in state post-conviction actions. The Public Defender of Indiana represents approximately 1700 clients at any given time. A client who is able to maintain strong family relationships tends to have a better institutional conduct record, and also tends to be better able to focus on and understand the strengths and weaknesses of his or her case.

The Women's Prison Association and Home, Inc.

Founded in 1844, the Women's Prison Association and Home, Inc. (WPA), provides social services to 2000 women a year in the New York criminal justice system. WPA also provides technical assistance and training nationally. Because over seventy-five percent of women in the criminal justice system are mothers, much of WPA's work centers on family preservation. WPA finds that visitation and contact during incarceration are directly tied to the likelihood of family reunification upon release.

STATEMENT

This *amicus* brief focuses on the Michigan Department of Corrections (MDOC) regulations at issue that impose across-the-board bans on non-contact visits with certain categories of family members. Among the challenged regulations is a bar on visits by an unemancipated minor child, unless that child is the child, stepchild, or grandchild of the prisoner. Mich. Admin. Code R. 791.6609 (2)(b). Visits by minor siblings, nieces, nephews, and cousins are forbidden,[2] even if the

[2] After the district court handed down its decision, the MDOC changed its policy to allow visits by minor siblings. However, on appeal, the

prisoner played a significant role in the child's life and the child's non-prisoner parent wants the child to visit the prisoner. *Bazzetta v. McGinnis*, 286 F.3d 311, 315 & 318-20 (6th Cir. 2002). Another policy prohibits visits by the prisoner's own child if the prisoner's parental rights have been terminated, even if parental rights were terminated voluntarily to allow adoption by another family member and visits are court-ordered or recommended by a therapist. Mich. Admin. Code R. 791.6609 (6)(a). *Bazzetta*, 286 F.3d at 319. An immediate family member or legal guardian must accompany a child on every visit,[3] so a family friend or extended family member cannot bring a child to visit, even with the child's parent's permission. Mich. Code. Admin. R. 791.6609 (5). *Bazzetta*, 286 F.3d at 320-21. For incarcerated parents, this may mean that their own children cannot visit them because there is no eligible adult to accompany them. *Id.* at 320-21.

SUMMARY OF ARGUMENT

> Tonight I ask Congress and the American people to focus the spirit of service and the resources of government on the needs of some of our most vulnerable citizens: boys and girls trying to grow up without guidance and attention, and children who have to go through a prison gate to be hugged by mom or dad.
>
> —President George W. Bush, State of the Union Address, January 28, 2003

MDOC defended its ability to impose this restriction. *Bazzetta v. McGinnis*, 286 F.3d 311, 318 n.1 (6th Cir. 2002).

[3] The Question Presented in Petitioner's Petition for a Writ of Certiorari stated that the regulation required minor children to be accompanied by a parent or a legal guardian, Petition at i. However, Petitioner's Brief, the Sixth Circuit's Opinion, and the language of the regulation agree that a child may be accompanied by an immediate family member. Petitioners' Brief at 4; *Bazzetta*, 286 F.3d at 320; Mich. Admin. Code R. 791.6609(6)(a).

This case requires this Court to determine the limits on the restrictions that states may place on prisoners' constitutional right to association with their families. It will decide whether nieces may visit aunts; minors can visit older cousins; and children informally cared for by extended kin may visit parents. It will determine whether some of the visits described by President Bush in his State of the Union address just a few weeks ago will go forward. The fundamental constitutional right of family association has been long recognized by this Court. *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984); *Moore v. City of East Cleveland*, Ohio, 431 U.S. 494, 504-05 (1977). The Sixth Circuit's opinion relied in part on a First Amendment analysis, *see Bazzetta*, 286 F.3d at 316, but it also relied on the constitutional interest in association with family, *Id.* at 317.

This Court has said, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Prisoners' rights may be severely restricted, however, under the *Turner* standard, which is very deferential to prison officials and the exigencies of prison operation. 482 U.S. at 85 & 89-91. The *Turner* standard is the appropriate framework for analyzing the regulations in this case, which infringe on the fundamental right to associate with family members. The analysis set out in *Turner*, which dealt in part with inmate-to-inmate correspondence, is not limited to the First Amendment context. It also applies to other fundamental rights, as demonstrated by the fact that *Turner* itself also recognized prisoners' right to marry. 482 U.S. at 91. *See Washington v. Harper*, 494 U.S. 210, 224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

The MDOC regulations are not rationally related to legitimate penological interests, as required by *Turner*. 482

U.S. at 89. Michigan's proffered rationales of averting the smuggling of contraband and protecting children from injury and sexual assault are undermined by the fact that the only visits at issue are *non-contact* visits. Moreover, there are alternative means of reducing the volume of visits that do not infringe on the fundamental right of family association. At best, the Michigan policies represent an "exaggerated response" to a few incidents. 482 U.S. at 90-91.

In fact, by loosening family ties, these policies run counter to the recognized penological interests of reducing recidivism and facilitating success upon release. The United States concedes that family visits assist prisoners in preparing to return to society. Brief of United States at 3. Studies demonstrate that family visitation during incarceration and support upon release correlate with reduced recidivism, improved prospects for success on parole, and less substance abuse. Over half a million prisoners returned home in 2000, and those numbers will only increase. Restrictions that undermine prospects for reentry threaten public safety. James P. Lynch & William J. Saybol, *Prisoner Reentry in Perspective* 4-5 (Urban Institute 2001).

The United States and *amicus curiae* Criminal Justice Law Foundation (CJLF) assert that there are no limits to the restrictions that states may place on such association. They invite this Court to abandon the framework for analyzing infringements of prisoners' constitutional rights set out in *Turner*, 482 U.S. at 89-91, and to look instead to whether prisoners had a right to visitation in colonial America. This is not the proper analysis.

Even if this Court looks to very early American history to determine the outer limits of prisoners' right to associate with family, the history of prisons does not endorse a total ban on family visitation, as suggested by the United States and CJLF. At the time that the Framers were in Philadelphia in the late 1780s, children were allowed to stay with their

parents in that city's Walnut Street Jail. H.E. Barnes, The Evolution of Penology in Pennsylvania 88-90 (1968). Although the Pennsylvania and Auburn systems of the early nineteenth century prison reforms separated prisoners from the outside world, these systems were abandoned in part because they caused mental illness. Norval Morris & Daniel J. Rothman, The Oxford History of the Prison 124 (1995); Lawrence Friedman, Crime and Punishment in American History 77-82 (1993). In 1849, Pennsylvania prison physician Dr. Robert Givens recommended that prisoners be allowed letters and visits from relatives, in order to mitigate the harsh mental and physical effects of the solitary system. Barnes at 295-96.

Finally, by forbidding even non-contact visits with family members who may be willing to travel great distances to see the prisoner, the Michigan regulations inflict unnecessary pain without penological justification. Thus, they violate the Eighth Amendment to the U.S. Constitution. *Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002).

ARGUMENT

I. U.S. CITIZENS POSSESS A FUNDAMENTAL RIGHT TO ASSOCIATION WITH FAMILY MEMBERS THAT SURVIVES INCARCERATION, ALBEIT SUBJECT TO QUALIFICATION UNDER THE *TURNER* STANDARD.

A. This Court has recognized a constitutional right to intimate association with family members.

The Sixth Circuit's opinion in this case was based in part on the First Amendment, *Bazzetta*, 286 F.2d at 316, and in part on the fundamental right of family association, *see id.* at 317. It has been well established for many years that Americans possess a constitutionally protected right to decision-making about intimate associations such as marriage, child bearing, and child-rearing. *Griswold v. Connecticut*, 381 U.S.

479, 485-86 (1965); *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510, 534-35 (1925). "[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court," this Court wrote recently. *Troxel*, 530 U.S. at 65.

Over twenty-five years ago, this Court recognized that association with extended family members is constitutionally protected. *Moore v. City of East Cleveland*, Ohio, 431 U.S. 494. The *Moore* Court said:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. . . . Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 504-05. (footnotes omitted).

Only two years ago, this Court acknowledged once again the importance of extended family in modern American life, and reaffirmed that a state should give weight to decisions of a fit, custodial parent regarding a child's association with extended family members. *Troxel*, 530 U.S. at 66-67. The

Troxel Court reaffirmed the *Moore* Court's observations regarding the importance of extended family. "The demographic changes of the past century make it difficult to speak of an average American family," wrote the *Troxel* Court. *Id.* at 63. "The composition of families varies greatly from household to household." *Id.* "[P]ersons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of childrearing." *Id.* The Court recognized that states may protect children's relationships with relatives outside of the nuclear family; it also concluded that states must give weight to parents' determinations regarding these associations. 530 U.S. at 67-75.

Amicus curiae CJLF attempts to distinguish between a First Amendment right to expressive association and the right to intimate association, asserting that the right to family association enjoys less protection. Brief of *Amicus Curiae* CJLF at 8-9 and 15-16. Amicus relies heavily on *Roberts*, 468 U.S. at 619, in which this Court reaffirmed the fundamental right of family association:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

468 U.S. at 618-19. Although the *Roberts* Court concluded that no right to intimate association was implicated in that case, which involved membership in a nonprofit civic organization, it did not imply that intimate association is

afforded less constitutional protection than expressive association. 468 U.S. at 621-22.

This case involves the associational interests recognized by this Court in *Moore* and *Troxel* and *Roberts*. A minor child of a prisoner may live with a relative who is not her legal guardian or a member of her immediate family. A child also may have a significant kin relationship with an adult prisoner who is not a blood relative. In either circumstance, the MDOC regulations could bar the child from visiting the prisoner relative, even if the custodial parent wants the child to visit. Kinship care is a reality in modern American life, and is addressed more fully in other amicus briefs in support of Respondents. According to the 1999 National Survey of America's Families, 2.3 million children lived with non-parent relatives in 1999. Amy Jantz, *et al.*, *The Continuing Evolution of State Kinship Care Policies* 1 (Urban Institute 2002). In recognition of the fact that "the bond between children and kin . . . may include other, non-related persons," more than twenty states currently define kin for the purpose of foster care placement to include those who are related beyond blood, marriage, and adoption. *Id.* at 6.

The tradition of extended family is particularly well-rooted in the African-American community, which is significant here because in 2000, 46.3 percent of prisoners serving a felony sentence in the U.S. were African-American. Paige M. Harrison, *et al.*, *Bureau of Justice Statistics Bulletin: Prisoners in 2001* 11 (July 2002). Extended kin networks historically were important in West African culture and, in this country, African-American families adapted to the hardships of slavery by relying on family networks that incorporated both blood relatives and "fictive" kin. Herbert G. Gutman, *The Black Family in Slavery and Freedom 1750-1925* 185-230 (1976). The emphasis on extended family – including relationships other than blood ties—continues in the modern African-American community, and is reflected in

high rates of "informal adoption" and kinship care. Andrew Billingsley, *Climbing Jacob's Ladder: The Enduring Legacy of African-American Families* 27-35 (1993); Robert B. Hill, *The Strengths of African American Families: Twenty-Five Years Later* 123-24 (1999). The regulations at issue threaten these fundamental relationships.

B. The constitutional right of association with family members survives incarceration, although subject to limitation under Turner.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Prisoners' rights, however, are subject to restriction based on the realities of prison life, pursuant to the *Turner* standard. 482 U.S. at 84-91. Like other constitutional rights, a prisoner's right of association with family members may be limited under *Turner*, but only if the regulation is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. *See Shaw v. Murphy*, 532 U.S. 223, 228-29 (2001); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The MDOC regulations at issue simply fail to meet even the *Turner* standard, as explained in Section II.

Turner is the appropriate framework for analyzing the regulations at issue here. *Turner* examined regulations governing inmate-to-inmate correspondence and prisoners' marriages. This Court has not limited *Turner's* reach to the First Amendment context. It is well settled that *Turner* also provides the framework for analyzing restrictions on other fundamental rights. This Court has said, "the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington*, 494 U.S. at 224. "In *Turner* itself we applied the reasonableness standard to a prison regulation that imposed severe restrictions on the

inmate's right to marry, a right protected by the Due Process Clause." *Id.*

There is no question that the realities of incarceration involve physical separation from home and family. *Olim v. Wakinekona*, 461 U.S. 238, 248 n.9 (1983). Although the right of prisoners and their families to association is necessarily limited by the prisoner's incarceration, the constitutional right itself is not extinguished, as this Court recognized in *Turner* by concluding that prisoners retain a fundamental right to marry. 482 U.S. at 95. *Turner* did not conclude that a prisoner is stripped of all rights except those that may be discerned from the history of colonial jails. Rather, this Court undertook "to formulate a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Id.* at 85. In *Turner*, this Court recognized that its prior prison jurisprudence had "inquired whether a prison regulation that burdens fundamental rights is reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to these concerns." *Id.* at 87.

The United States and *amicus curiae* CJLF assert that prisoners' constitutional rights are an all-or-nothing proposition—prisoners either retain the constitutional right or are divested of it. Brief of United States at 12-13; Brief of *Amicus Curiae* CJLF at 15-20. The United States relies on a line paraphrased from the pre-*Turner* case, *Pell v. Procunier*, 417 U.S. at 822, to argue that prisoners retain only those rights that are not inconsistent with their status. Brief of United States at 12. The sentence states in full, "[a] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or *with the legitimate penological objectives of the corrections system*." *Pell*, 417 U.S. at 822 (emphasis added). The next line states that challenges to constitutional rights "must be analyzed in terms of the legitimate policies and goals of the corrections

system." *Id.* Thus, *Pell* is a precursor to the framework more fully developed in *Turner*, not a competing standard.

More fundamentally, the United States and *amicus curiae* CJLF essentially ask this Court to abandon the framework set out in *Turner*, and to look to whether prisoners enjoyed a right to visitation at the dawning of the republic in determining the extent of prisoners' constitutional rights. Brief of *amicus curiae* CJLF at 18-19; Brief of United States at 17-18. This is not the correct standard for analyzing infringements of constitutional rights after *Turner*. It is also an unworkable standard, because, as this Court recognized in *Turner*, management of modern prisons presents complicated logistical and security issues, demanding professional expertise. 482 U.S. at 89. Many of these problems—and their solutions—were unknown in colonial times. The proper balance between prisoners' rights and the imperatives of prison management cannot be determined solely by looking to history.

Even if this Court were to abandon the framework set out by *Turner* and to instead analyze the history of prison visitation in the U.S. to determine the limitations on the constitutional right of association with family members, the history of incarceration is much more complicated than that presented by the United States and CJLF. As *amici* in support of the Petitioners state, the modern prison as we know it did not exist in colonial America. Colonial Americans relied heavily on shaming and corporal punishments. Norval Morris & David J. Rothman, The Oxford History of the Prison 112-14 (1995). However, at least in some states where jails existed, children sometimes were confined along with adults. Richard Vaux, historian of the Eastern Penitentiary in Philadelphia, described the common jail in Philadelphia in the late 1770s as containing "young and old, black and white, men and women, boys and girls . . . congregated indiscriminately in custody . . .". H.E. Barnes, The Evolution of Penology in Pennsylvania 72 (1968).

In fact, at the time that the Constitutional Convention met in Philadelphia in the late 1780s, parents incarcerated at Philadelphia's Walnut Street Jail were allowed to keep their children with them. In 1787, the same year that the state delegations approved the Constitution, the Philadelphia Society for Alleviating the Miseries of Public Prisons made recommendations to the Pennsylvania General Assembly regarding possible reforms to the Walnut Street Jail. Its report noted, "children, both in the jail and the workhouse, are frequently suffered to remain with their parents . . . ." *Barnes* at 90. The Society's report also observed, "[i]n cases where women are imprisoned, having a child, or children, at the breast, they have only the allowance of a single person." *Id.* at 88. The Society was concerned that women prisoners who were breast-feeding were not allotted additional rations, despite the fact that incarcerated mothers apparently were allowed to keep nursing infants with them in the jail. *Id.*

In the late eighteenth and early nineteenth centuries, in an effort to reform Pennsylvania's primitive criminal justice system, authorities adopted "the separate system," in which prisoners were to contemplate their crimes in solitary confinement and silence. Morris & Rothman at 117. New York adopted a similar but competing system, the Auburn system, which included congregate work. Lawrence M. Friedman, Crime and Punishment in American History 79-80 (1993). The theory was that removing the prisoner from the corrupting influence of his environment would promote rehabilitation. *Id.* at 77. However, Pennsylvania's system was abandoned by the 1860s, in part because it became clear that absolute isolation caused mental illness. Morris & Rothman at 124. Governor William F. Johnston, in his annual message in 1850, reported, "[t]he frequent recommendations to the Executive for the pardon of convicts afflicted with ill-health and mental imbecility, would appear to require a modification of the penal laws." *Id.* at 296. In 1849, Robert Givens, the physician at the Eastern

Penitentiary, urged that prisoners be allowed to receive letters and visits from relatives, in order to reduce the deleterious effects of solitary confinement. Barnes at 295-96.

Even this Court has recognized the unhealthy effects of early American experiments with solitary confinement:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890). The nation's history of penological experiments and repeated criminal justice reforms hardly demonstrates that family visitation is not a part of our traditions.

II. THE RESTRICTIONS ON NON-CONTACT FAMILY PRISON VISITATION IMPOSED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS ARE NOT REASONABLY RELATED TO LEGITIMATE PENOLOGICAL INTERESTS AS REQUIRED BY *TURNER*.

A. Michigan has failed to articulate how these regulations are rationally related to a legitimate penological interest.

This case does not require the Court to conclude that prisoners have any right to be incarcerated closer to home and family. *Cf. Olim*, 461 U.S. 248 n.9. The only question presented is whether the Michigan policy of restricting non-contact visits by extended family members who are sufficiently motivated to travel to the prison is rationally related to a legitimate penological interest. In fact, these regulations fail to meet the *Turner* standard. Moreover, they

run counter to penological interests recognized by this Court, including deterrence of crime and rehabilitation of prisoners. *O'Lone v. Shabazz*, 482 U.S. 342, 349 (1987). By further loosening family ties, the challenged regulations undermine prisoners' chances for successful reentry and, accordingly, threaten public safety.

Turner requires a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89-90. *If* such a reasonable relationship exists, *Turner* requires the Court to go on to consider: (1) whether there are alternative means for exercising the constitutional right open to the prisoners; (2) the impact that accommodation of the asserted constitutional right will have on guards and other inmates; and (3) whether the policy is an "exaggerated response" to prison concerns and whether other obvious, easy alternatives exist. *Id.* at 90.

In the proceedings below, the MDOC proffered a number of stated goals for restricting non-contact visitation, including preventing the smuggling of contraband, preventing injuries to children in the waiting areas and visiting rooms, protecting children from sexual assault, and reducing the volume of visits.[4] *Bazzetta v. McGinnis*, 148 F.Supp. 2d 813, 848 (E.D. Mich. 2001). None of these satisfies *Turner*.

The first three justifications fail the threshold *Turner* inquiry. The only visits at issue are *non-contact* visits. It strains the imagination to conceive of how contraband could be exchanged or a child molested during a *non-contact* visit with the prisoner, who is separated from the visitors by glass. In fact, in the district court, the defendants conceded that

[4] *Amici* in support of the petitioner Michigan also claim that policies authorizing suspension of family visitation are an important tool in prison discipline. Brief of *amicus curiae* Colorado at 1. This rationale, even if accepted, would justify only the last of the challenged regulations—the suspension of visitation privileges after two major misconducts for substance abuse. Mich. Code Admin. R. 791.6609(11)(d).

there was no record of any sexual abuse of a minor child during a non-conduct visit since 1984. *Bazzetta*, 148 F.Supp. 2d at 828. On appeal, MDOC appears to rely on a single incident in which an inmate reportedly exposed himself to his wife through a glass partition, although they concede that there is no evidence in the record that the child could even observe this event. Petitioners' Brief at 15. These regulations are precisely the sort of "exaggerated response" to a single incident that *Turner* forbids. *Turner*, 482 U.S. at 91.

There was testimony in the district court that these restrictions on minor visitors were based on prison officials' personal feelings about whether it was advisable for children to visit prison. *Bazzetta*, 148 F.Supp. 2d at 824-28. It is inappropriate to rely on the personal child-rearing views of prison officials to justify these policies. Under *Turner*, courts defer to prison officials' judgments regarding management of prisons—not other state institutions—based on wardens' expertise in prison administration. 482 U.S. at 84-85. For those reasons, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. Judgments about whether association with incarcerated family members is in the best interests of visitors' children are not based on penological interests. Even state lawmakers empowered to pass statutes governing family relations, and state courts charged with applying them, may not substitute their judgments about children's visitation with relatives for those of fit, custodial parents. *Troxel*, 530 U.S. at 72-73. Prison officials may not substitute their judgment in this area, either.

The remaining justification—reducing the volume of visits—also fails *Turner* because there are easy, alternative means to accomplish that goal without infringing on protected constitutional rights. As the district court observed, prison officials "can adjust visiting hours or take any of the other steps that are within [their] authority to control visits without

excluding these categories of visitors altogether." *Bazzetta*, 148 F.Supp. 2d at 831. For example, prison officials can limit the total number of visits per prisoner so that all prisoners have a reasonable chance to visit given space and resource limitations. MDOC policies are an "exaggerated response" to the logistical problems created by a growing prison population and an increasing number of visits. *Turner*, 482 U.S. at 90. "Visits with whole categories of individuals should not be prohibited altogether absent a reasonable basis for believing that non-contact visits will not address security concerns adequately." *Bazzetta*, 148 F.Supp. 2d at 831-32.

The State of Michigan asserts that inmates have alternative means of maintaining family contact—letter writing and the telephone. Brief of Petitioners at 29. These vehicles cannot substitute for face-to-face contact with family members. Letters lack the spontaneity of in-person communication, and prisoners' correspondence has a particularly long turn-around time, due to prison security and censorship. Collect calls from prison are prohibitively expensive. Indeed, state corrections agencies and private prison companies enter into contracts with phone companies that require telephone companies to pay back to corrections agencies a percentage of the revenue from calls. *See* Paul Duggan, "Captive Audience Rates High: Families Must Pay Dearly When Inmates Call Collect," *Washington Post*, January 23, 2000, at A3.[5] These alternate modes of communication cannot take the place of visits.

[5] Increased phone charges are passed on to the consumers, prisoners' families who receive the collect calls. In 1997-98, the Florida state prison system collected $13.8 million in such commissions, while New York received $20.5 million, and Virginia $10.4 million. Paul Duggan, "Captive Audience Rates High: Families Must Pay Dearly When Inmates Call Collect," *Washington Post*, January 23, 2000, at A3.

B. The challenged regulations run counter to the acknowledged penological interest of reducing recidivism.

Far from representing a rational response to legitimate penological concerns, the MDOC policies run counter to acknowledged penological interests. The United States concedes that that Bureau of Prisons (BOP) "encourages family visits because they can promote positive relationships that improve prisoner morale, strengthen family ties and parental responsibility, and facilitate the transition to freedom." Brief of United States at 3. By undermining prisoners' family ties, the MDOC restrictions fail to address penological concerns regarding recidivism and reentry. These penological interests are acute because in recent years, the number of prisoners returning home has increased dramatically, creating challenges for the families and communities that must reintegrate them. The number of prisoners released jumped from 170,000 in 1980 to 585,000 in 2000. James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective* 4 (Urban Institute 2001). The growing number of prisoners released reflects, in part, a four-fold increase in the prison population in the United States over the last twenty years, from 330,000 incarcerated Americans in 1980 to nearly 1.4 million incarcerated Americans in 1999. *Id.*

Significant rates of prisoner return have important consequences for some of our most socio-economically disadvantaged communities, predominantly communities of color. A large number of prisoners will return to a relatively small number of disadvantaged communities. In 1996, two-thirds of state prisoners were released into counties that contain the central city of a major metropolitan area. Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 41 (Urban Institute 2001). The New York State Department of Correctional Services releases about 25,000

people per year to New York City. Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City* (Vera Institute of Justice 1999). Parolees are concentrated even within major cities. Six police precincts in Brooklyn, which account for twenty-five percent of the total population, hold fifty-five percent of Brooklyn's parolees. Travis, Solomon & Waul at 41. This level of concentration means that reentry will produce a significant public safety concern in certain communities. In the District of Columbia, in 2001, for example, more than 2500 prisoners were projected to return over a twelve-month period, raising concerns about the city's ability to provide services and prevent an increase in the crime rate. Arthur Santana, "D.C. Unprepared for an Influx of Ex-Convicts, City Officials Say," *Washington Post*, July 21, 2001, at B1.

One of the cheapest and most natural means of improving prisoners' chances for successful reentry is allowing them to maintain contact with family members during incarceration. "[P]risoners with family ties during the period of incarceration do better when released than those without such ties." Travis, Solomon & Waul at 39. Ex-offenders who have a supportive family are more likely to find work, and less likely to use drugs and become involved again in crime. *Id.* A small study by the Vera Institute of Justice tracked prisoners released to New York City. It concluded:

> For the vast majority of people we interviewed, families play a large role in their lives during the first thirty days after they leave prison or jail. Families provide critical material support—housing, food, and, to a lesser extent income—and some also offer emotional support . . . . Their support is strongly correlated with a person's success in the month after release.

Nelson, Deess & Allen at 8. Most returning prisoners live with family members when they are released. Marta Nelson

& Jennifer Trone, *Why Planning for Release Matters*, 3 (Vera Institute of Justice 2000). In the Vera Institute study, forty of the forty-nine people interviewed were living with a relative or with their spouse or partner two days after release. Nelson, Deess & Allen at 8. Returning prisoners who reported strong family support in the Vera study also had an easier time finding work, perhaps because the family network helped them in job searching. Nelson, Deess & Allen at 14.

Most relevant, prisoners who receive more family visits have a better chance for success on parole. Family visitation during incarceration correlates with success on parole. N.E. Schafer, *Exploring the Link Between Visits and Parole Success*, 38(1) Internat'l J. of Offender Therapy and Comparative Criminology 17-19 (1994). Studies comparing parole outcomes with the number of family visits that a prisoner receives during the period of incarceration demonstrate that prisoners who receive more visits are more likely to avoid problems while under supervision. C. F. Hairston, *Family Ties During Imprisonment: Important to Whom and For What?*, J. of Sociology & Social Welfare 97-99 (1987). Only two percent of the men who had three or more visitors during the year prior to their release returned to prison within one year, compared with twelve percent of those who had no contact with family or friends. *Id.* at 97-98. Seventy percent of prisoners with three or more visitors had no problems on parole, as compared with only fifty percent of those who had no contacts with friends or family during incarceration. *Id.* at 98.

Family support during incarceration also has been demonstrated to reduce recidivism. C.F. Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 (1) Federal Probation 48-52 (1988). Prisoners who have maintained their family ties may be better positioned to avoid crime upon release, because family can provide immediate, material support. There are also more

intangible ways that family visitation during incarceration can help to avert recidivism. Working to improve family relationships—to become a better parent, for example—can provide an important incentive for avoiding further law-breaking. John M. Jeffries, *et al.*, *Serving Incarcerated and Ex-Offender Fathers and Their Families*, 4 (Vera Institute of Justice 2001). Family visitation can help a prisoner to maintain a self-image that includes positive life roles ("big brother," "aunt"). Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity*? at 50. "Having maintained these social roles during incarceration, the prisoner is more likely to be able to function in desirable social roles upon release." *Id.* Otherwise, "upon release the ex-prisoner functions in those roles ascribed to 'convicts'." *Id.*

Recent research also has demonstrated that family support can play a critical role in combating substance abuse. Eileen Sullivan, *et al.*, *Families as a Resource in Recovery from Drug Abuse* 54 (Vera Institute of Justice 2002). This is significant, because three out of four returning prisoners have a history of substance abuse, and most of them will not have received treatment while incarcerated. Nelson & Trone at 4. In the Vera Institute study, for example, newly released prisoners reported that family members accompanied them to Narcotics Anonymous meetings, or simply provided support to help them avoid temptation. Nelson, Deess & Allen at 10.

To the extent that MDOC policies restrict visits by prisoners' *own* children, who do not have another immediate family member or legal guardian to bring them to visit, these policies have disastrous consequences for parent-child relationships, which are examined more fully in other amicus briefs in support of the Appellees. More than 1.5 million minor children had an incarcerated parent in 1999, an increase of more than a half-million since 1991. Travis, Solomon & Waul at 37. This increase is due, in part, to the

fact that the number of women in prison has more than doubled since 1990. *Id.* There are now over 85,000 sentenced women prisoners in the United States. Paige M. Harrison, *et al.*, *Bureau of Justice Statistics Bulletin: Prisoners in 2001* 12 (July 2002). Logistical barriers and distance already ensure that more than half of fathers and mothers never have a personal visit with their children while they are incarcerated, regardless of restrictive visitation policies. Travis, Solomon & Waul at 38. However, the visitation restrictions at issue here could further compound the problem, particularly for incarcerated mothers. Twenty-six percent of children of incarcerated mothers live with relatives other than grandparents. *Id.* If these kinship caregivers are not legal guardians, and do not fall within the state's definition of "immediate family," they will not be allowed to bring children to visit their parents under the challenged MDOC regulations. Lack of visitation can only compound families' attempts to reunify upon a prisoner's return.

The fact that visitation serves penological interests is reflected in the standards promulgated by the American Correctional Association (ACA). ACA standards provide that "an inmate may receive [visits] and the length of visits may be limited only by the institution's schedule, space, and personnel constraints, or when there are substantial reasons to justify such limitations." American Correctional Association Standards for Adult Correctional Institutions, Standard 3-4440 (Ref.2-4381) 149 (3rd ed. 1990). The comment to the standard provides:

> Inmates should not be denied access to visits with persons of their choice except when the warden/ superintendent or designee can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.

Id.

The State of Michigan has failed to articulate how an across-the-board ban on non-contact visits by family members bears a rational relationship to any legitimate penological interest. In fact, the arbitrary nature of the policy is underscored by the fact that these regulations fly in the face of acknowledged penological interests. If the *Turner* standard has any meaning, these regulations cannot be upheld.

III. THE RESTRICTIONS ON NON-CONTACT PRISON VISITATION IMPOSED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

The ban on family visitation enacted by MDOC violates the Eighth Amendment prohibition on cruel and unusual punishments because it inflicts wanton psychological pain without any legitimate penological justification. It is true that this Court has held that U.S. prisoners, once convicted and sentenced to imprisonment, may be transferred within a state or even among states. *See Meachum v. Fano*, 427 U.S. 215, 229 (1976); *Olim*, 461 U.S. at 244-51. It does not necessarily follow that the Constitution permits a state to bar a prisoner from seeing his family, even if relatives travel to visit him at their own expense. The MDOC regulations at issue here are not merely a "fortuitous consequence" of confinement, resulting from a lack of bed space in a particular region. *Olim*, 461 U.S. at 248 n.9. Rather, these regulations are an "additional element of . . . punishment." *Id.* This conclusion that suspension of visitation is, in fact, punishment is reinforced by the fact that Michigan suspends visitation as a sanction for substance abuse.[6] Mich. Admin. Code. R. 791.6609 (11)(d).

[6] The Sixth Circuit analyzed only the Michigan regulation that suspends visitation as a sanction for substance abuse under the Eighth Amendment. *Bazzetta*, 286 F.3d at 322. However, this Court's certified question asks more broadly "[w]hether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment." Accordingly, this section addresses the broader issue of whether the across-the-board restrictions violate the ban on cruel and unusual punishment.

"The basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man." *Hope v. Pelzer*, *supra*, 122 S. Ct. at 2514 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). "This Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Prisons officials violate the Eighth Amendment when they enact a deprivation that is "objectively, sufficiently serious" and that constitutes "the unnecessary and wanton infliction of pain." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

"Unnecessary and wanton inflictions of pain are those that are totally without penological justification." *Hope*, 122 S. Ct. at 2514. This Court has recognized that infliction of mental pain may violate the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring). In 1937, this Court recognized the "need to give protection against torture, physical or mental." *Palko v. State of Connecticut*, 302 U.S. 319, 326 (1937).

For all of the reasons outlined in Section II, above, the regulations at issue not only lack a penological justification but are, in fact, counter to legitimate penological interests. They inflict unnecessary psychological pain for no rational reason. They strip prisoners and their family members of basic human dignity by disrupting efforts to maintain family ties through a period of incarceration. Even extended family members who are willing to travel for days and expend limited family income on transportation are banned from the prison. Prisoners convicted of drug crimes and auto theft are cut off from their families just as arbitrarily as those

convicted of domestic violence or sexual abuse. Inmates are robbed of their most intimate associations and fundamental roles, no matter what lengths their families are willing to go to maintain them.

Contrary to the assertion of *amicus curiae* CJLF, *see* Brief of CJLF at 28-29, it is clear that prison officials acted with deliberate indifference to prisoners' rights in enacting this ban. Unlike situations that involve prison officials' omission or failure to act in the face of a known threat, in this case, prison officials passed a regulation forbidding certain categories of visits. *Cf. Farmer*, 511 U.S. at 834 (failure to protect); *Estelle*, 429 U.S. at 104 (failure to provide adequate medical care). Thus, prison officials' intent to cause the infringement of prisoners' constitutional right of association with family members is incontrovertible.

This Court recently has reaffirmed that Eighth Amendment violations must be judged by "the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002). As described above in Section IB, the Auburn and Pennsylvania systems, which were based on the theory that prisoners must be isolated from the outside world, were abandoned long ago. As early as 1849, Pennsylvania prison physician Robert Givens urged allowing prisoners letters and visits from relatives in order to combat the deleterious effects of solitary confinement. Barnes at 296. "A few years ago," he wrote to the prison inspectors, "the effects of our discipline on the health of those subjected to it were entirely unsuspected, its friends being so dazzled by its moral influences as to be totally blind to its physical and mental evils." *Id.* at 297. Charles Dickens, who visited the Philadelphia prison in the early 1840s, concluded that although its intentions were humane, its design had cruel effects. "I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body," he wrote. Morris & Rothman at 124. By the 1860s, the Auburn and

Pennyslvania systems had been abandoned. *Id. See also* Friedman at 82. This Court should not apply *devolving* standards of decency to allow reestablishment of isolation in the nation's prisons.

As the district court wrote, the MDOC restrictions on visitation disrupt relationships that constitute "the essence of what it means to be human." *Bazzetta*, 148 F.Supp. 2d at 855. They deny prisoners "a single, identifiable human need," just as surely as if they deprived inmates of food, heat, or exercise. *Wilson v. Seiter*, 501 U.S. 294, 305 (1991). Indeed, for many, these circumstances can fairly be described as the loss of "all that makes life worth living." *Ng Fung Ho et al.v. White*, 259 U.S. 276, 284 (1922).

CONCLUSION

Only a few weeks ago in the State of the Union address, President Bush reminded the nation of "children who have to go through a prison gate to be hugged by mom or dad." This case will determine the extent to which states can place restrictions on these visits. It will decide whether an aunt can take her children to visit their cousin, a teenager incarcerated on an adult criminal charge. It will determine whether a "godparent" who is informally keeping a friend's children while their mother is incarcerated can take the children to see their mother. *See generally* Arthur Santana, "Families Lamenting Life After Lorton: With Prisoners All Over Country, Relatives Find Visits Daunting," *Washington Post*, March 21, 2002, at T10. It also will decide whether this Court will continue to apply the *Turner* standard to analyze infringements on prisoners' constitutional rights, and whether that standard will have any meaning.

For all of the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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